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Pennsylvania Special Education Hearing Officer
Final Decision and Order

CLOSED HEARING

ODR File Number: 21170-18-19

Child's Name: G. S. **Date of Birth:** [redacted]

Parents:
[redacted]

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Hearing Officer: James Gerl, CHO **Date of Decision:** May 27, 2019

DECISION

DUE PROCESS HEARING

21170/18-19KE

BACKGROUND

The parents filed a due process complaint alleging that the school district improperly found the student to be not eligible for special education, that the school district breached its child find obligation to the student, and that the school district failed to reimburse the parents for an independent educational evaluation. In this case I find that the parents have not demonstrated that the determination that the student was not eligible for special education was inconsistent with the law. I also find that the allegation that the school district violated its child find duty has not been established by the parents. In addition, I find that the school district is not responsible for paying for the independent educational evaluation obtained by the parents.

PROCEDURAL HISTORY

At the due process hearing, which was conducted over two sessions, seven witnesses presented testimony. Parents' Exhibits 2, 3 and 5 through 12 were admitted into evidence; the parents withdrew exhibits P-1 and P-4 as duplicative. The school district's Exhibits 1 through 27 were admitted into evidence. School district Exhibit 28 was not admitted because objections that it was not relevant and that it was not proper rebuttal were sustained at the hearing. Exhibit S-28 is included with the record in a sealed envelope in the event that a reviewing court might want to review the document, but Exhibit S-28 was not considered in the preparation of this decision.

After the hearing, counsel for each party presented written closing arguments/post-hearing briefs and proposed findings of fact. All arguments submitted by the parties have been considered. To the extent that arguments advanced by the parties are in accordance with the findings, conclusions, and views stated below, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain arguments have been omitted as not relevant or not necessary to a proper determination of the material issues as presented herein. To the extent that the testimony of various witnesses is not in accordance with the findings as stated below, it is not credited.

Personally identifiable information, including the names of the parties and similar information, has been omitted from the text of the decision that follows. FERPA 20 U.S.C. § 1232(g); and IDEA § 617(c).

ISSUES PRESENTED

Counsel were asked to provide a bulleted list of issues before the hearing. Counsel for the district complied, but the former lawyer for the parents referred to the due process complaint. Unfortunately the complaint in this case was inartfully drawn appearing to have been cobbled together from a formbook, listing issues such as educational records and the statute of limitations, neither of which were really at issue or supported by any evidence at the hearing. The lack of clarity regarding the issues presented was resolved at the outset of the first session of the hearing, however, when counsel for both parties agreed that the following three issues were presented in this case:

1. Was the eligibility committee determination that the student was not eligible for special education and related services under IDEA or Section 504 inconsistent with the law?
2. Did the school district violate its child find duty with regard to the student for the period from September 2016 to the date of the hearing?

3. Is the school district required to reimburse the parents for an independent educational evaluation?

FINDINGS OF FACT

Based upon the parties' stipulations of fact at the due process hearing, the hearing officer makes the following findings of fact:

1. The student and the student's parents are residents of the school district.
2. The student is school age and was born on [redacted].
3. The student commenced enrollment in the school district at beginning of the 2015 – 2016 school year.
4. The parents' private evaluator is qualified as a certified school psychologist.
5. For purposes of determining special education eligibility of students with a specific learning disability, the school district is not approved by the State to use the response to intervention model for identification purposes.

Based upon the evidence in the record compiled at the due process hearing, the hearing officer makes the following findings of fact:¹

6. The student has been described as a great kid who works hard and wants to do well. (NT 230-232, 259; S-8)

7. The student attended kindergarten at a private parochial school. After the student's first year of kindergarten, the parents and the staff at the private parochial school decided to have the student repeat kindergarten, this time at a second private parochial school. (NT 413; S-8)

8. The parents enrolled the student in public school at the school district after first grade at the suggestion of the staff of the second parochial private school because it was felt that the student would benefit from the additional reading help that would be available at and could be provided by the school district. (S-8; NT 417, 458)

9. During the student's third grade year, school year 2016 – 17, the student was administered the QRI-5 reading assessment on September 1, 2016 by the district's

¹ (Exhibits shall hereafter be referred to as "P-1," etc. for the parent's exhibits; "S-1," etc. for the school district's exhibits; references to page numbers of the transcript of testimony taken at the hearing is the hereafter designated as "NT____").

reading specialist. The scoring on the QRI revealed that the student was instructional at third grade reading level and attained a test score of 76%. (S-1; NT 105 – 188)

10. The student received support from the reading support teacher four days a week for 30 minutes per session. During the third grade school year, the amount of reading support was reduced to 15 minutes per session for four days a week after the reading support teacher noted the student's progress. The student received reading instruction from the reading specialist outside of the regular classroom, but the student still received all of the normal instruction provided by the regular education teacher. (NT 105 – 188; NT 259, 477; S-1; P-10; P-11)

11. The student's final reading grade for the third grade was 89, which is a B+, and the student's final writing grade for the third grade was 90, which is an A-. The student had zero unexcused absences during the third grade school year. (S-18)

12. On September 4, 2017, the student's parents requested that the district perform a full neurological assessment on the student. (S-4; S-7)

13. The report of the school district evaluation of the student was issued on November 14, 2017. The evaluation included an observation of the student by the school district's school psychologist on October 23, 2017. The evaluator reviewed the QRI test results, and the Teacher's College Reading and Writing Assessment, and other assessments and concluded that the student, who was then in fourth grade, was reading at the beginning of the fourth grade level. The school district evaluator administered a

number of assessments to the student, including the WISC-V assessment, which revealed that the student's full-scale IQ was 101, which is in the average range. The evaluator also administered the Fifer Assessment of Reading and the student's scores on this assessments were within the average range. The school district evaluator also administered the Kaufman Test of Educational Achievement and the Woodcock-Johnson Tests of Achievement. On the Woodcock-Johnson Test of Achievement, the student's scores were in the average to below average ranges. The school district evaluator used assessments to measure the student's reading and written expression. The Kaufman Test of Educational Achievement revealed that the student was in the average range for phonological processing. The school district evaluator considered the student's progress monitoring data, as well as the student's grades, information provided from the student's teachers and other school records. The evaluator analyzed the student's performance on the eight SLD domains in the SLD portion of the report. Although the evaluator identified strengths and weaknesses in the student, the evaluator concluded that the student was performing at an average level overall. The evaluation report concludes that the student, who was then in fourth grade, was performing at grade level standards for the fourth grade. The school district evaluator used grade level norms rather than age norms on the standardized testing because the student had been retained in kindergarten and age-normed testing would be inappropriate. (S-8; NT 21 – 105; NT 487 – 495)

14. As a result of the evaluation conducted by the school district, the eligibility committee determined that the student was not eligible for special education because the student did not require specially designed instruction. The district issued a Notice of Recommended Educational Placement/ Prior Written Notice to that effect on November 14, 2017. (S-9; NT 88-91, 21 – 105)

15. On November 27, 2017, the student's mother emailed the district's school psychologist stating that the parents disagreed with the district evaluation and objecting to the district's use of grade-level testing as opposed to the parents' preferred age-level testing. (S-10; NT 454-457)

16. On January 1, 2018, the student's mother emailed the district's school psychologist stating that the independent evaluator who had been hired by the parents wanted to observe the student at school. The district's school psychologist emailed the student's mother on January 2, 2018 to set up the observation. (S-10)

17. The student's grades were consistently A's and B's throughout the student's time as a student enrolled in the school district. (NT 409 – 475; S-18)

18. The student's PSSA scores in the spring of 2017 were basic in English language arts and mathematics. In the spring of 2018, the student was proficient in mathematics and science and received a basic PSSA score in English language arts but the student's English language arts scores were much closer to the proficient level than the scores for the previous year. (S-18; NT 231, 277-282)

19. In the 2017 – 2018 fourth grade year for the student, the student made good progress in the general education classroom and with the reading specialist. The student's teacher did not modify assignments for the student. The student's final grade in reading for fourth grade was 92, which was an A. The student's final grade in writing for fourth grade was 88, which was a B+. The student showed no signs of anxiety during the fourth grade at school. The student had one unexcused absence during the fourth grade school year. (S-18; S-19; S-20; P-11; NT 229-232, NT 188 – 246; NT 105 – 188)

20. In the fifth grade for school year 2018 – 2019, the student made good academic progress in the general education classroom and with the reading support teacher. The student's reading was consistently instructional at the fifth grade level during fifth grade. The student's teacher did not modify assignments for the student. The student's final grade in reading for fifth grade was 99, which was an A+. The student's final grade in writing for fifth grade was 92, which was an A-. The student showed no signs of anxiety at school during the fifth grade. (S-18; S-24; NT 326 – 409; NT 258, NT 105 – 188; P-26; NT 246-274)

21. The student did not have any attendance issues or display any signs of anxiety at school. The parents did not inform school district officials that the student suffered from anxiety. The student has not received any outside therapy or treatment for anxiety. (NT 409 – 475; NT 69, 92, 232-233, 258-259, 259-260, 375, 380-381; 441-442; S-18)

22. The student did not exhibit any problem behaviors at school. (S-18; NT 71-72, 92, 188-246, 233, 258, 454, 479; S-8)

23. On May 16, 2018, the parents' independent evaluator performed a neuropsychological evaluation of the student at the parents' request. The evaluation included two classroom visits by the evaluator. The evaluator administered a number of assessments to the student, including the Differential Abilities Scales – Second Edition; the Kaufman Test of Educational Assessment-3; Gray Oral Reading Test-5; Comprehensive Test of Phonological Processing-2 and Test of Written Language-4. Many of these assessments were age-normed rather than grade-normed. The evaluator also administered the DELIS Ratings of Executive Function and the BASC-3 Rating Scales. The BASC Rating Scales completed by both parents and by the student's teachers all had scores in the average range. The report of the evaluation concludes that the student has average intellectual skills. The evaluator concluded that the student has weaknesses in certain areas, and therefore could be eligible with a specific learning disability under IDEA. The evaluator also concluded that the student had generalized anxiety disorder. The evaluator made a number of recommendations with regard to the student's educational program. (S-15, NT 387-388, 326-409)

24. The testing scores and data obtained by the school district evaluator and the parents' independent evaluator were very consistent. (NT 76; NT 366; S-8; S-15)

25. The parents' evaluator looked at the student through a medical lens. The school district evaluator looked at the student through an educational lens. The focus of the parents' evaluator was on the student's weaknesses. The school district evaluator looked at the overall performance of the whole student. (NT 61, 21 – 105; S-8; S-15)

26. To determine whether a student is making progress or being successful, the emphasis should not be on the weaknesses of the student but the overall performance of the student as an individual. All students have some weaknesses. The student's work samples reveal a number of grammatical errors, but the student successfully answered many of the reading questions in those assignments. (NT 64, 230-233, 493 – 495; P-7)

27. The student's classroom performance was consistent with grade level standards, and the student made progress in general education classes and with the reading support teacher. (NT 87 – 91; 105-188; 188-246; 246-270; S-18)

28. On November 14, 2018, the district convened a meeting and determined that the student did not need a 504 plan or accommodations pursuant to a 504 service plan. On November 15, 2018 the district issued a prior written notice stating that the student did not need accommodations under a 504 plan. (S-26; S-27; NT 491)

CONCLUSIONS OF LAW

Based upon the arguments of counsel, all of the evidence in the record, as well as independent legal research by the hearing officer, the hearing officer makes the following conclusions of law:

1. Under IDEA, an evaluation must include a variety of assessment tools and strategies to gather relevant functional, developmental and academic information about the child, including information provided by the parent, that may assist in determining whether the student is a child with a disability. The evaluator must use technically sound instruments that may assess the relative contributions of cognitive and behavioral factors, in addition to physical or developmental factors. Assessments must be valid and reliable and they must be administered by trained and knowledgeable personnel. All assessments must be administered in accordance with the instructions provided by the producer of the assessments. The evaluation must ensure that a student is assessed in all areas of suspected disability. 34 C.F.R. § 300.304; 22 Pa. Code § 14.123.

2. To be eligible for special education and to be entitled to a free appropriate public education, a student must be a “child with a disability.” To be a child with a disability, a student must have one of the enumerated conditions and by reason thereof need special education and related services. 34 C.F.R. § 300.8(a); 22 Pa. Code § 14.101.

3. Section 504 of the Rehabilitation Act provides that no otherwise qualified individual with a disability shall solely by reason of her or his disability be excluded from participation and/or be denied the benefits of or be subjected to discrimination under any program that receives federal funds. 29 U.S.C. § 794; 34 C.F.R. § 104.33; 22 Pa. Code § 15.1. To establish a violation of Section 504, a parent must prove (1) that the student is disabled; (2) that he was otherwise qualified to participate in school activities; (3) that the school district received federal funds and (4) that the student was excluded from participation in, denied the benefits of or subject to discrimination at the school. Ridley School District v. MR and JR ex rel. ER, 680 F. 3d 260, 58 IDELR 271 (3d Cir. 2012).

4. School districts are required under the IDEA child find requirement to identify and evaluate all students who are reasonably suspected of having a disability. P.P. v. Westchester Area School District, 585 F. 3d 727, 738 (3d Cir. 2009); Parrin ex rel. JP v. Warrior Run School District, 66 IDELR 225 (M.D. Penna 2015) adopted at 66 IDELR 254 (M.D. Penna 2005); 34 C.F.R. § 300.111; 22 Pa. Code § 14.121. However, a formal special education evaluation is not required every time that a child posts a poor grade, struggles in school, or misbehaves. Ridley School District v. MR and JR ex rel. ER, 680 F. 3d 260, 58 IDELR 271 (3d Cir. 2012); DK by Steven K and Lisa K v. Abington School District, 696 F. 3d 233, 59 IDELR 271 (3d Cir. 2012).

5. A parent has a right to an independent educational evaluation if the parent disagrees with an evaluation obtained by the public agency. If the parent requests an independent educational evaluation at public expense, the public agency must without unnecessary delay either (i) file a due process complaint to request a hearing without unnecessary delay to show that its evaluation is appropriate; or (ii) ensure that an independent educational evaluation is provided at public expense. 34 C.F.R. § 300.502(b)(1) and (2). If a parent obtains an independent educational evaluation at public expense or shares with a public agency an evaluation obtained at private expense, the results of the evaluation must be considered by the public agency if it meets agency criteria in any decision made with respect to the provision of FAPE to the child. 34 C.F.R. § 300.502(c).

6. The parents have not demonstrated that the school district's conclusions that the student was not eligible for special education or a 504 plan in the instant case was inconsistent with the law.

7. The parents have not demonstrated that the school district has violated its child find duty with regard to the student in the instant case.

8. The parents are not entitled to reimbursement by the school district for the independent educational evaluation that they obtained in the instant case.

DISCUSSION

1. Was the eligibility committee determination that the student was not eligible for special education and related services under IDEA or Section 504 inconsistent with the law?

The gravamen of the Complaint in the instant case involves the parents' contention that the student was eligible for special education and related services, but that the eligibility committee found the student to be not eligible. On November 14, 2017, the school district conducted an evaluation of the student and concluded that the student was not eligible for special education. The evaluation conducted by the school district was comprehensive and thorough. The evaluator used a variety of assessment tools and strategies to gather relevant information about the student. The instruments used were technically sound and reliable and valid. The evaluation was consistent with all of the requirements specified by IDEA. *See* 34 C.F.R. § 300.304. The school district evaluator considered the student's school performance in conducting the evaluation, including progress monitoring results, as well as grades and information provided by the student's teachers. The district's school psychologist testified that although the student had some areas of weakness, as most students do, the student was performing well in general education classes and advancing from grade to grade. Accordingly, the eligibility committee concluded that the student was not eligible for special education

because, to the extent that the student had a disability, the student was not by reason thereof in need of special education and related services.

The parents disagreed with the evaluation conducted by the school district and hired an independent evaluator to conduct a neuropsychological evaluation of the student. The report of that independent educational evaluation was issued on May 16, 2018. The independent evaluator concluded that the student was eligible for special education. The parents contend that the report of the independent evaluator shows that the eligibility committee should have found that the student was eligible for special education. The parents' contention in this regard is rejected.

It is significant to note that the school district evaluator and the parents' independent evaluator both testified that the results of their testing and the other data that they compiled were very consistent. Accordingly, the difference in their conclusions concerning the student's eligibility for special education revolve around their different viewpoints; the parents' evaluator adopted a medical lens whereas the school district evaluator adopted an educational lens. The educational focus of the school district evaluator is more appropriate for purposes of a special education eligibility determination, and therefore, it is given more weight.

To the extent that the testimony and conclusions of the parents' evaluator and the parent is inconsistent with the testimony and conclusions of the district's school

psychologist and other district staff, the testimony of the district's school psychologist and other district staff is found to be more persuasive and credible because of the demeanor of the witnesses, as well as the following factors:

The parents' independent evaluator failed to consider the student's grades and the results of progress monitoring for the student at school. Indeed, there is very little information in the independent evaluator's report concerning the student's school performance. Accordingly, the report of the parents' independent evaluator is not comprehensive and thorough, as it fails to consider important information about the student's school performance in making its special education eligibility conclusion.

In addition, the parents' independent evaluator disregarded the parent rating scales concerning student anxiety in determining that the student had an anxiety disorder. Also, the parents' independent evaluator focused specifically upon the student's weaknesses, whereas the district's school psychologist more appropriately focused upon the whole child. Moreover, the parents' evaluator used a number of assessments that were age-normed rather than grade-normed; this was not appropriate because the student repeated kindergarten and was a full year behind most students who were [the student's] age.

The credibility of the testimony of the student's mother is impaired by the fact that the student's mother was very evasive on cross-examination concerning whether

or not the parents' evaluator had suggested that the parents object to the school psychologist's use of grade level norms for the student rather than age level norms.

In their posthearing brief, the parents contend that the district evaluator failed to consider the eight domains involved in a specific learning disability determination. See 34 CFR § 300.309(a). The district evaluator, however, clearly analyzed the eight domains in the portion of the district's evaluation report concerning SLD eligibility. Moreover, both the parents' independent evaluator and the district's school psychologist testified that the data and other results of their assessments were very consistent. The consistency of the testing data negates this argument. The parents' argument is rejected.

Accordingly, it is concluded that the parents have not proven that the school district's determination that the student was not eligible for special education was erroneous or legally noncompliant. It is clear from the record evidence that the student does not need specialized instruction and is not eligible for special education.

The parents also argue that the student should have been found eligible under Section 504. The parents' post-hearing brief, however, provides no analysis or argument concerning whether the student has a 504 disability and no argument or allegations that the student has been discriminated against by the school district. Although the parents' brief quotes from an OCR letter and some inapposite case law,

there are no allegations that this student has a disability as defined by section 504, or that the student needed particular accommodations, or that the school district discriminated against the student in any way. No evidence in the record supports any such allegations. The parents' argument is rejected as not supported by the record evidence.

The parents have not demonstrated that the eligibility committee determination that the student was not eligible for special education violated either IDEA or Section 504.

2. Did the school district violate its child find duty with regard to the student for the period from September 2016 to the date of the hearing?

The student's parents contend that the school district should have evaluated the student for special education much earlier than it did. The standard for child find is a reasonable suspicion that the student is a child with a disability under IDEA and 504.

In the instant case, the student did not exhibit any red flags that the student had a disability during the student's time in the school district. The evidence in the record demonstrates that the student was making good progress at school. The student was working on grade level and passing from grade to grade making A's and B's in general

education classes. There is no evidence that the student exhibited any inappropriate behaviors at school.

In addition, the teachers and other staff that worked with the student did not observe any signs that the student was demonstrating anxiety while the student was at school. If the student suffered from anxiety at home, it was not being displayed while the student was at school. The district did not have reason to suspect that the student had a disability.

One argument advanced by the parents must be addressed. The parents contend that because the district gave the student extra help in reading, the district should have considered the student to be a child with a disability or at least suspected as much. The record evidence reveals that the student was receiving additional reading assistance from a reading support teacher, but that this help was available to other general education students as well. Indeed, the parents enrolled the student in public school at the suggestion of the staff of their former parochial private school because they wanted the student to receive precisely this additional help in reading. It would be highly unfair to punish a district for providing additional assistance to students who have some difficulty in reading but are not necessarily suspected of having a disability, particularly where the parents expressly requested such help for the student upon enrollment. The parents' position is rejected. It should be noted that the special assistance in reading

given to the student was not special education pullout, as the parents allege in their post-hearing brief. The student was a general education student and received the full complement of instruction in the general education classroom. The student received the reading assistance in addition to that instruction. The parents' argument is rejected.

The parents' posthearing brief also refers to a contention that the parents had requested an IDEA evaluation while the student was in first grade. This contention is outside of the timeframe established by counsel for the parties at the beginning of the hearing. The issue regarding child find and compensatory education was expressly limited by the parties to the period from September 2016 to the date of the hearing. The references in the parents' brief to the allegation that the parents had requested an IDEA evaluation while the student was in first grade are not credited because they are outside the relevant time frame.

The parents' brief also challenges the school district evaluation as not comprehensive. As was discussed concerning the previous issue, however, the district's evaluation of the student was very thorough and comprehensive. In contrast, the parents' independent evaluation is not comprehensive as it did not consider highly relevant information about the student's school performance.

The parents' posthearing brief provides no specific argument that the district violated its Section 504 child find duty. See discussion of the previous issue.

The evidence in the record does not support a conclusion that the district should have reasonably suspected that the student had a disability under IDEA or 504. The parents have not demonstrated that the school district violated its child find duty with regard to the student.

Moreover, as has been demonstrated in the previous section, the student is not eligible for special education under IDEA. Even assuming arguendo, therefore, that the school district had violated the child find provisions of IDEA, the appropriate remedy for a child find violation would consist only of an order to evaluate the child. Because the school district has already evaluated the child, there would be no relief that could be granted for such a violation. Clearly compensatory education would not be an appropriate remedy where the student is not eligible for special education in the first place.

3. Is the school district required to reimburse the parents for an independent educational evaluation?

Although a parent has a right to an independent educational evaluation at public expense if a parent requests one from a school district and the school district does not choose to file a due process complaint to prove the appropriateness of their evaluation,

there is no evidence that the parents in this case made any request to the school district for an independent educational evaluation at public expense. Instead, the parents obtained an independent evaluation on their own. The parents were within their rights to obtain an independent evaluation, and the school district was dutybound to consider it. However, because the parents did not follow the procedure established by IDEA concerning requesting an independent evaluation at public expense, the school district is not obligated to pay for the evaluation. The parents' argument that they should be reimbursed for the independent evaluation is rejected.

It should be noted that under certain circumstances, a hearing officer may require a district to pay for an independent evaluation as an appropriate equitable remedy. Such a remedy would only be appropriate, however, where a school district has first violated IDEA or 504. Indeed, the function of a remedy is to help cure a violation of the law. In the instant case, the parents have not shown that the school district has violated IDEA or Section 504 in any way. Accordingly, there is no underlying basis for an equitable remedy, such as reimbursement for the evaluation that they obtained on their own.

The parents have not demonstrated that the school district must reimburse them for the independent educational evaluation that they obtained on their own.

CONCLUSION

It is concluded that the parents have not demonstrated that the student is eligible for special education under IDEA or 504. It is further concluded that the parents have not demonstrated that the school district violated its child find duty concerning the student under IDEA or 504. It is further concluded that the parents have not demonstrated that the school district must reimburse them for the independent educational evaluation that they obtained on their own. It is concluded further that the parents have not demonstrated that the school district violated IDEA, 504 or the federal regulations or the Pennsylvania statutes or regulations concerning special education.

ORDER

Based upon the foregoing, it is HEREBY ORDERED that all of the relief requested in the due process complaint is hereby denied. The complaint is dismissed.

IT IS SO ORDERED.

ENTERED: May 27, 2019

James Gerl

James Gerl, CHO
Hearing Officer